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A Reflection Upon Amnesty / The Case for Alternative Service: A Reply to Professor Sax

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A Reflection Upon Amnesty

by Professor Joseph L. Sax

This commentary was written especially for *Law Quad Notes* by Professor Joseph L. Sax and, along with the accompanying article by Professor Douglas A. Kahn, served as a basis for a recent law faculty seminar on amnesty.

With a single stroke Gerald Ford converted the amnesty problem from a peripheral political issue into an operative program. Considering how little the public in general was agitated about amnesty, the existence of any sort of program today is remarkable. As late as mid-1972, a *Newsweek* poll showed only 7 percent of the public in favor of unconditional amnesty, and by April 1974, that figure had risen to just 34 percent in the Gallup Poll.

While some of those to whom Mr. Ford's program is now available will doubtless take advantage of it, public attitudes about amnesty will continue to be highly important over the next several years for a number of reasons. Many resisters and deserters will not bring themselves within the terms of the present program; of those who do, the question whether to shorten or rescind the terms of alternative service will remain. It is a continuing feature of the amnesty question that with each passing year public attitudes become more sympathetic, and historically (as with our own War Between the States) amnesties tend to be granted in stages, with the terms over time becoming increasingly generous. Perhaps most significantly, we ought to ask some hard questions about the broader meaning of an obligation of alternative service.

It seems fair to begin with the assumption that most Americans fall neither in the category of those who feel that unconditional amnesty is the only morally acceptable decision nor of those who demand that war resisters be treated like any other criminals. Rather, the majority appears to view the President's program as an appropriate solution to an ambiguous problem: Those who refused to participate in the Vietnam War had much justice on their side; still, obedience to even dubious legal commands must hold a high priority in a society that prizes stability and cohesion.¹ As against the risk of being killed in combat, languishing in a federal prison, or being permanently separated from family and home, the requirement of two years alternative service seems magnanimous. Moreover, it is widely thought desirable that vigorous young men should devote a brief period of their lives to public service in hospitals or other such places where aid is badly needed and can be ill-afforded.

However seductive such a compromise may at first appear, I am persuaded that it cannot withstand analysis. Let us take a look at the claims for imposing a requirement of alternative service at this time. They are, so far as I can tell, four in number. First, it can have a deterrent effect for the future, setting a precedent that refusal to serve in the armed forces should not be lightly undertaken; second, it may have a punitive effect, making the point that legal disobedience, even for good reasons, should not be given a status of acceptability; third, it im-

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1. My comments here are directed to those who stand in this middle group and not to those who oppose all amnesty on principled grounds. My views on amnesty generally are set out in "The Amnesty Problem," *Law Quad. Notes*, Vol. 16, No. 3, p. 25 (Spring, 1972).

The Case For Alternative Service A Reply To Professor Sax

by Professor Douglas A. Kahn

Professor Sax advocates that unconditional amnesty should be granted to Vietnam draft evaders and deserters, and he contends that the condition of alternative service imposed by President Ford, while superficially attractive to some, is unsupported by an acceptable rationale. While I harbor misgivings concerning the grant of any type of amnesty for Vietnam evaders and deserters, I have concluded that amnesty should be given provided that it is conditioned on the performance of some service such as that required by President Ford's program. Obviously, this places me squarely at issue with Professor Sax, and I will attempt to detail the specific areas where our analyses or perspectives diverge.

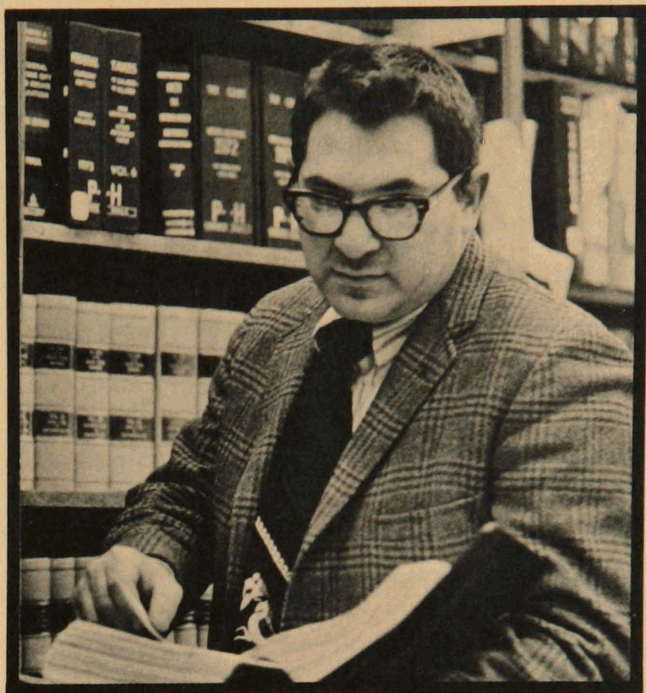
First, we should note that the question of amnesty is a political question and therefore that the granting of amnesty and the form it takes should be determined principally by political considerations. Secondly, a consideration of whether amnesty should be unconditional should begin by determining the grounds for granting any form of amnesty. Obviously, there will not be uniform agreement on those grounds, and I would expect that Professor Sax and I would discover our first area of disagreement in our respective resolutions of that issue. Nevertheless, I will examine those grounds for amnesty that occur to me.

One rationale which might be offered in support of an amnesty policy is that the war was "illegal" because it was not declared in accordance with the terms of the Constitution or some similar contention. I do not wish to discuss that issue (partly because of space limitations and partly because I do not regard it seriously), but I would note that apart from the legality of the war, I personally feel quite certain that the draft was legal. In any event, I suggest that there is not sufficient political support for the view of illegality to warrant granting amnesty for that reason, and as I stated previously (and I assume that this statement is not controversial), the granting of amnesty rests primarily on political considerations.

Another ground for amnesty would be to serve as an official admission of the errors of judgment and morality made in prosecuting the Vietnam War and to serve as a recognition of the merits of those who resisted it. While undoubtedly there are many Americans who would favor such an admission, I do not think it would be seriously suggested that there is sufficient political support for that position to warrant its adoption. Parenthetically, I should note that by "political support," I do not refer to congressional action but rather I mean to refer to the position held by a majority of American citizens—albeit I realize that one's appraisal of the majority's position is something less than an educated guess. Regardless of whether the war constituted an error of judgment and/or morality, I believe that a significant majority of Americans regard the act of evading the draft or desertion as reprehensible.

A third ground, which I believe is the position adopted by Professor Sax in his paper, is that amnesty is an appropriate vehicle for repairing the current division in our country by wiping the slate clean and hopefully thereby putting behind us the internal turmoil caused by

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Douglas A. Kahn

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the prosecution of the Vietnam War. Referring to the Civil War amnesty as a precedent, Professor Sax suggests that a major purpose of an amnesty is to renew and restore confidence and fraternal feeling among the citizenry. Of the various reasons offered for granting amnesty, this desire to restore unity appears to be the most widely held, and indeed it is that purpose which led me to favor some form of amnesty.

It is important, however, to consider who is to be the object of this quest for unity. Initially, it should be noted that while there are similarities between the present situation and the post Civil War period, there are also great dissimilarities. The Civil War was fought to maintain the unity of the nation, and if all those who participated in the rebellion (which included the great majority of Southerners) were punished for their participation, the prospects of obtaining a lasting unity would have been slim indeed. Moreover, despite the revolutionary characterization of the war, the post-war position of the South was similar to that of a conquered nation and amnesty was consistent with that reality. A more analogous example would be the treatment afforded to deserters from the Union Army, and, while that situation also presented different issues from the Vietnam War, after my brief and concededly incomplete inquiry, I was not able to determine that any deserter was given unconditional amnesty.

The purpose of seeking unity through an amnesty might be aimed at seeking to re-unite the nation with its prodigal children who departed the country, or through the symbolic act of terminating the last vestige of the war it might be aimed at regaining the participation in our national activities of those members of our society who (though they remained within the country's boundaries) were alienated by the war, or it might be aimed at both groups. My own personal reason for accepting an amnesty program is to unify those who have remained within the jurisdiction of the United States; I see no intrinsic benefit in inducing the evaders and deserters to return other than as an effort to minimize the division among those who remained.

In seeking to mollify those who strongly urge amnesty, however, we must not overlook the substantial number

of persons who strongly oppose the granting of an amnesty of any kind. We will have no unification if we mollify one group at the cost of alienating an equally substantial or even larger group. Consequently, an amnesty conditioned on alternative service is a political compromise in the best sense of that term. It takes into account two widely divergent and strongly held views and seeks a middle ground which provides enough to each group to meet their basic demands even though neither group gets all of what it wants. Indeed, where political action is a resultant vector of sincerely held but irreconcilable positions of major segments of the society, the democratic process is operating at its optimum. If either or both groups are totally dissatisfied with the Ford program, then the compromise failed, but despite grumbling that has not yet happened; and even the failure of the compromise would not prove that it should not have been tried.

I regard the desirability of compromising this issue as a sufficient justification of the Ford program. However, there are additional and independently sufficient reasons for conditioning amnesty on alternative service.

The act of desertion or draft avoidance was not a mere technical legal violation but was a serious offense and a morally reprehensible act. If society fails to punish those acts, it will condone grievously illegal behavior. Professor Sax seeks to minimize the significance of those illegal acts and suggests that society often adopts "a more rigorous position against civil disobedience than is appropriate to the complexity of life." However, the crimes committed by these young men were not mere trespasses on private property or even relatively minor destructions of property. By shirking their obligation to serve in the armed forces, the deserters and evaders did far more than harm some amorphous fictional entity called the government of the United States, they harmed specific individuals—namely, the young men who served in their place and who would not have been required to serve but for the acts of desertion or evasion by those for whom amnesty is now sought. While many of those who filled in the ranks left bare by the deserters and evaders undoubtedly were not subjected to combat, it is reasonable to assume that a number of them were subjected to the risks of combat and that a portion of those who engaged in combat suffered severe consequences. Where an individual fraudulently evades his income tax liability, it is

If . . . there is a consensus in this nation that the acts of the evaders and deserters were reprehensible, then the symbolic condemnation of those acts is quite appropriate, and in no event should the Government signal its approval of those acts.

regarded as a serious criminal act; but that action merely shifts a disproportionately larger tax burden to his fellow citizens and typically the amount falling on any one citizen is relatively small. The action of the evaders and deserters was far more serious; each evader shifted his burden of service and all risks attendant thereto to a single innocent fellow citizen.

I should also note that the decision to punish serious illegal actions does not depend upon a deterrence rationale. If, during a domestic quarrel, a man killed his wife, he should be punished for that crime even if there is no likelihood that he will ever sin again and even though such punishment is not likely to deter other spouses from doing away with their mates in the heat of an argument. Similarly the punishment of draft evaders and deserters does not rest on a determination of whether such punishment will deter others.

Many persons contend that draft evaders were motivated by altruism rather than by a highly developed sense of self-preservation. Undoubtedly, altruism was the principal motive in some cases. Undoubtedly, in many cases, self-interest was the dominant motive. I suspect that in a large number of cases, these motives were so intertwined that the young men themselves could not determine whether they were seeking to save all of humanity or only one specific member. Where it can be demonstrated in an individual case that a young man's dominant motive for fleeing the country was to comply with his moral standards, the flight might well have been a courageous act; but even then his behavior would not necessarily be regarded as laudatory—action which I regard as reprehensible (in my moral judgment) does not become laudatory in my eyes merely because the action was motivated by good intentions. Moreover, while an individual's defiance of the draft may have been altruistically motivated, his flight from the country to avoid prosecution almost certainly was not.

An individual's adherence to his own conscience is a mitigating factor in determining the proper punishment to be imposed, and in appropriate cases, a prosecutor might refrain entirely from prosecuting such an individual. Concededly, it is not feasible to provide a case by case review of the actions of all the deserters and evaders, and the subjective nature of the inquiry makes the determination of even a single case very difficult. But, the fact that some might qualify for prosecutorial discretion or for a reduced punishment does not justify granting a blanket indulgence to all those who fled unless there is a conviction that at least a majority of those who fled were primarily motivated by altruistic considerations. There can be no hard evidence on this question, and so we can do little more than resort to our intuition. For myself, I am skeptical of the altruistic motives of those who preserved their own safety at the sacrifice of the safety of others, particularly where they fled to avoid the consequences of their acts. Consequently, I believe that a substantial majority of the evaders acted primarily in response to what they regarded to be their self-interest,¹ and therefore I cannot justify an unconditional amnesty. The assumptions that a person makes as to the likely motives of the evaders and deserters will likely be based on that person's view of human nature, and perhaps others will hold a less cynical view than I.

In any event, given my assumptions, President Ford's program is both reasonable and magnanimous. To obtain

1. While the contention has been made that the self interest of evaders and deserters would have been better served by their yielding to the draft, I doubt that the majority of evaders viewed their interests that way at the time they fled the country, and even with hindsight I am not convinced that they erred in their evaluation of the risks.

A weighing of such risks would not merely consider the probability of being sent into combat, it would also consider the extent of the consequences of losing that gamble.

clemency, an evader must accept a mild and inoffensive sanction; he must devote two years to "good works." Professor Sax describes this as involuntary servitude and indeed it is; so is the draft and so are the prison sentences imposed on those who refused to serve in the draft but who did not flee the country. The servitude imposed on the returnees will likely be far more palatable than was military service during war time or was a prison sentence. Indeed if the evaders did flee because of a commitment to altruism, the requirement that they work for the betterment of society should be a particularly gentle sanction.

Another ground for imposing a service requirement is the inequity of granting an unconditional pardon when draft resisters who remained in the United States were jailed. I take it to be a basic premise of justice that persons committing similar acts be treated similarly to the extent possible. Evaders and deserters defied the law requiring military service and fled the country to avoid punishment for their acts. Others defied the same laws and were subjected to prison sentences therefor. It would be inequitable to permit the returnees to escape from any punishment when the only difference between their acts and those who served a jail sentence is that the returnees fled after or while committing their crimes. As previously noted, there are strong political reasons for not subjecting the returnees to a prison sentence, but it is necessary to impose some sanction upon them (such as the relatively mild sanction of alternative service) to provide a semblance of equity and even then the returnees are given preferential treatment. The requirement of relatively equal treatment is not only of concern to those who are treated unequally but also is of concern to all of us who live under our legal system since we have an interest in seeing that our system deals fairly with all who are subjected to its processes.

Finally, we reach what for many may be the most important consideration of all. The imposition of conditions on the granting of an unconditional amnesty has symbolic meaning which has stimulated much of the controversy surrounding the Ford program. An unconditional amnesty will be read by many as an official recognition that the actions of the evaders and deserters were justified. On the other hand, the condition of service (which does constitute a sanction) signals a condemnation of the returnees' acts. Indeed, newspaper interviews with a number of war resisters suggest that their principal objection to the requirement of service is that they are unwilling to accept a judgment of condemnation. The resolution of this question rests on political realities. If, as I believe, there is a consensus in this nation that the acts of the evaders and deserters were reprehensible, then the symbolic condemnation of those acts is quite appropriate, and in no event should the government signal its approval of those acts. However, if I have misjudged the situation so that, in fact, a majority of Americans approve of the acts of those who fled to evade military service, then a symbolic approval of those acts would be warranted. In this connection, note Professor Sax's observation that as of April of this year, the Gallup Poll indicated that only 34 percent of the population favored unconditional amnesty.